Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROSELYN ANN KEPLINGER,

Petitioner,

-VS-

RICHARD K. WILSON, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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PETITIONERS PRO SE

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QUESTIONS PRESENTED

1. May a party who presents previously unconsidered legislative evidence which establishes an affirmative intent in the 42d Congress to subject state judges to civil liability under 17 Stat. 13, Section 1, have a cause of action under the statute against state judges who have deprived him of Fourteenth Amendment rights, and may he bring the cause in the district court under the original jurisdiction bestowed by the statute upon that court?

2. Did the 42d Congress in enacting 17 Stat. 13, Section 1, intend the statute to be used equally and without distinction by any and all persons under jurisdiction of the United States to enforce the provisions of Amendment Fourteen?

3. Does the Fourteenth Amendment tolerate by default unequal enforcement of the laws by state judges when the default results from a judicial policy of exemption which deprives a citizen of the power to enforce the provisions of Amendment Fourteen by use of 17 Stat. 13, Section 1?

4. To what standard of liability should state judges be held under 17 Stat. 13, 42 U.S.C. 1983?

5. Did the courts below commit error in refusing to consider Petitioners' new legislative evidence on the judicial immunity issue and assume the conclusion in applying *Pierson v. Ray*, 386 U.S 547 (1967)?

PARTIES

The parties to the judgment of the court below are the following:

Roselyn Ann Keplinger, executrix of the estate of Annadale C. Roberts and individually, is the Petitioner.

Richard K. Wilson, William H. Wolff, Jr., and Mike Fain, judges of the Second District Court of Appeals of Ohio, are the Respondents.

The State of Ohio, a defendant below, has no interest in the outcome of this petition for a writ of certiorari.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Roselyn Ann Keplinger, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on November 22, 1993; petition for rehearing denied on January 20, 1994.

OPINIONS BELOW

The judgment of the United States Court of Appeals in *Keplinger v. Wilson, et. al.*, Docket No. 93-3588, entered on November 22, 1993, is unpublished. It is attached as Appendix I. The Order denying rehearing is attached as Appendix II.

Judgment of the federal District Court, Southern District of Ohio, in *Keplinger v. Wilson, et al.*, Docket No. C-3-92-192, March 19, 1993, is unreported. It is attached as Appendix III. The Order denying rehearing is attached as Appendix IV.

JURISDICTION

This court has jurisdiction to review the judgment of the court of appeals by grant of this petition for a writ of certiorari based on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action was brought to enforce the provisions of the Fourteenth Amendment to the United States Constitution. The texts of Sections 1 and 5 of the Fourteenth Amendment are attached as Appendix V. The principal statutory provision involved is 17 Stat. 13, codified as 42 U.S.C. 1983. The original text of the statute is attached as Appendix VI. The codified text, as Appendix VII.

STATEMENT OF THE CASE

A. Introduction

This case presents a constitutional challenge to intentionally discriminatory and conspiratorial conduct in abuse of office performed by the Respondents, state appellate judges acting under color of state law, which

resulted in constitutional injury and other damages to the Petitioners.

Utilizing fresh legislative evidence not previously considered by the federal courts, this case presents, in addition, a doctrinal challenge to the rule of absolute judicial immunity from civil suit as promulgated by the United States Supreme Court and applied to Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. 1983 through *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213 (1967) and the resultant line of cases. The challenge to immunity doctrine entails an ancillary challenge to the Court's functional interpretation of the jurisdictional grant of the Civil Rights Act of 1871, Section 1, 28 U.S.C. 1343(3), as expressed by the Court in Rooker-Feldman doctrine. *Rooker v. Fidelity Trust Co.*, 264 U.S. 413, 44 S. Ct. 149 (1923); *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303 (1983).

B. **Background**

This civil action was provoked by the Respondents-judges' knowing and intentional falsification on appeal of

the facts of a state lawsuit as means to the end of depriving the Petitioners of right to state jury trial. Deliberate perversion of truth, which the judges refused to correct upon request and which formed the necessary basis of the appellate opinion, is demonstrable on the face of the opinion, absent testimony, and entails loss to the Petitioners of equal protection of the laws and failure of due process. Maladministration of the law due to local prejudice, such as effected by the judges in this case, constitutes the classic situation intended by the Framers of the Civil Rights Act of 1871 to be reached by civil suit for damages in federal district court. The factual predicate to this suit is as follows.

In a wrongful death action based upon medical malpractice the state trial court entered summary judgment for the medical defendants and against Petitioners based upon nine identical conclusory expert medical-opinion affidavits, all of which were devoid of operative factual predicate and piled opinion upon opinion, each derivative of that immediately preceding. Pursuant to

the right afforded all other state suitors faced with conclusory affidavits, the Petitioners stood upon the allegations of the complaint, refusing to respond with contrary medical affidavits to improperly formed affidavits submitted in derogation of state procedural and evidential rules. Subsequently the Petitioners appealed the judgment of the trial court. They assigned error in sustaining the motion for summary judgment and asserted violation of Petitioners' right to state jury trial resulting from abridgement of Petitioners' right to equal protection of the laws of summary judgment.

On appeal the Respondents-judges herein sued deliberately created *de novo*, and delivered onto the face of the appellate opinion, false facts relating to the personal knowledge of the state defendants. The false facts created by the Respondents were sufficient to supply the medical-factual premises omitted from the moving affidavits below and were necessary to enable the appellate judges to affirm the judgment of the trial court.

In a motion to certify the record to the Supreme Court

of Ohio the Petitioners directed the attention of the appellate judges to their introjection of false fact into the case and challenged their subjection of Petitioners to disequal protection of state laws. The judges refused to correct the false facts, ignored the federal challenge, and denied certification of the record. Absent comment the Ohio Supreme Court overruled a request for certiorari. State violations of federal law, therefore, remained unrectifiable within the system of state courts, and the Petitioners, irreparably damaged in numerous ways by state action, were denied by the state both fair procedure by which, and a forum in which, to litigate federal claims.

C. **Facts**

To enforce constitutional rights and to recompense the damages inflicted upon them, the Petitioners sued the appellate judges, individually, in the federal district court invoking Sections 1 and 2 of the Civil Rights Act of 1871. Jurisdiction in the district court arose pursuant to 28 U.S.C 1343(3) and 28 U.S.C. 1331.

Petitioners alleged violations of the due process and equal protection clauses of Amendment Fourteen, and of the right to state jury trial. They further alleged, as disclosed by examination of public record, an animus-based local policy practiced by the state appellate court. The policy, directed against a class of medical suitors of which Petitioners were one, entailed, *inter alia*, improper affirmance of summary judgments based upon conclusory medical-opinion affidavits created and filed in behalf of physician-clients by the identical local law firms defending in the Petitioner's case. The complaint alleged conspiracy among the Respondents to obstruct and defeat the ends of justice. Petitioners sought equitable relief, also, in the district court.

To render patent the validity of their statutory cause of action against state judges, the Petitioners presented in the district court fresh, previously unexamined legislative evidence. That evidence was comprised of personal letters of Representative Samuel Shellabarger (R. Ohio), 42d Congress, the author of the Civil Rights Act of 1871,

and, additionally, of a seminal congressional report directed specifically to investigation of **deprivation of civil rights by state officers** in the post bellum South, **H.R. Report No. 16** (1867).[1]

H.R. Report No. 16 specifically defines in a civil rights context the scope and the meaning of the phrase, "any person, who under color of any law," as that phrase occurs in Section 1 of the Civil Rights Act of 1871.

The definition of the *descriptio* terms, "any person," furnished by **Report No. 16** comports precisely with the mandated meaning of those terms as statutized in the

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[1] **H.R. Report No. 16**, 39th Cong., 2d Sess. (1867). *Report of the Select Committee on the New Orleans Riots.* Washington 1867. Forty thousand copies of **H.R. Report No. 16** were printed for congressional distribution. *See, also,* Poore, *A Descriptive Catalogue of the Government Publications of the United States, September 5, 1774 – March 4, 1881* 848 at entry No. 3. Washington 1885.

For the immense historical importance of this Supreme Court-neglected document and its significance to the Reconstruction Congresses, *cf., The Articles of Impeachment Against Andrew Johnson,* Article X, Specification Third (1868). For other congressional usage of this document, *see, e.g.,* Conkling, *The Life and Letters of Roscoe Conkling* 273. New York 1889. For contemporary and popular significance of this document and its content, *cf., e.g.,* Guernsey and Alden, *Harper's Pictorial History of the Civil War* 821. New York 1880.

Dictionary Act of February 25, 1871, 16 Stat. 431 — which law stipulates that "words of general use are to be understood in their ordinary and popular meaning," and that the terms "any officer" and "any person" are convertible terms when used to denote persons performing acts under ægis of office.

Containing the 42d Congress' working definition of the "any person" language, **H.R. Report No. 16** (co-authored by Shellabarger) **was incorporated by explicit reference** on Shellabarger's part as the House floor manager of the Civil Rights bill into floor debate to the measure **both as the factual premise underlying the Civil Rights bill of 1871 and as the controlling rationale for enactment of the measure into law.**

In sum, the fresh legislative evidence which the Petitioners submitted in the district court documented irrefutably that the customary congressional usage of the terms "any person" included state judges. They demonstrated that precisely that customary language was employed by the 42d Congress in Section 1 of the 1871

Civil Rights Act and therein intended by Congress to signal the liabilty of state judges, and all other state officers, to civil suit under the statute.[2]

By this and other evidence conjoined with cogent argument the Petitioners displayed in the district court the validity of their cause of action against state judges.

Adopting initial and supplemental recommendations of a magistrate judge to whom the case was referred, the district court declined to hear the Petitioners' legislative argument on the merits. The ground of refusal was that the Supreme Court alone could entertain such an argument. The district court, therefore, dismissed the complaint on the Respondents' Fed. R. Civ. P. 12(b) motion and subsequently denied the Petitioners a rehearing.

The Petitioners appealed to the Court of Appeals for

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See, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.) for a precedential interpretation of "any person" as applicable to governmental officers ("The secretary of state, being a person, holding an office . . . is precisely within the letter of the description").

the Sixth Circuit. Explicitly adopting the recommendations of the district magistrate, the Sixth circuit, likewise, refused to grant a hearing to Petitioners' legislative evidence. On that basis it affirmed the judgment of the district court and denied both a rehearing by the original hearing panel and a rehearing *en banc*.

D. **Decisions Below**

The district court's conception of its power, as delineated in decisional law of the Supreme Court, dictated the result below on the threshold issue of a 42 U.S.C. 1983 cause of action against state judges and on the ancillary issue of original jurisdiction over such cause.

Espousing the authority of precedent, right or wrong until formally changed, the district court invoked *Pierson* and *Feldman*, *supra*, to dismiss the complaint, notwithstanding that countervailing evidence of congressional intent before the court rendered untenable the premises of those decisions. In overruling Petitioners' motion for rehearing the court said:

> In her Motion for Rehearing, Plaintiff argues that certain legislative history demonstrates

> that Congress did not intend that the doctrine of absolute judicial immunity should apply in actions under Section 1983. *See, e.g., Pierson v. Ray*, 386 U.S. 547 (1967) (per Warren, C.J.). Thus, even if this Court agreed with Plaintiff's view of the relevant legislative history, the decision to abolish absolute judicial immunity on the basis of that history, would rest with the Supreme Court of the United States and not with this Court.

The district court's policy decision,[3] embarrassing both the merits and equity, engineered strategy in a battle of attrition, rendering truth liable to succumb from sheer exhaustion or from expenditure of funds disproportionate to the quality of justice dispensed. The Sixth circuit, adopting the result and the reasoning below, applied tactics as district court strategy dictated.

Both inferior courts remained impervious to Justice Holmes' caveat, "A page of history is worth a volume of

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The choice to apply precedent and to exclude countervailing evidence is a policy decision. Such choice comports with Justice Holmes' assertion that judicial policy-making occurs when "a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law." Holmes, *Collected Legal Papers* 295. New York 1920.

logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 41 S. Ct. 506 (1921).

The Petitioners, therefore, request that this honorable Court entertain their legislative argument directed against the doctrine of absolute judicial immunity and review and reverse the judgment of the Court of Appeals for the Sixth Circuit.

REASONS FOR GRANTING THE PETITION

I. THE COURTS BELOW CONCUR THAT THE UNITED STATES SUPREME COURT CONSTITUTES THE SOLE PROPER FORUM IN WHICH THE PETITIONERS MAY GAIN A HEARING FOR FRESH LEGISLATIVE EVIDENCE WHICH CORRECTS SUPREME COURT MISINTERPRETATION OF THE TERMS OF SECTION 1 OF THE CIVIL RIGHTS ACT OF 1871.

Adducing new documentary legislative evidence of congressional intent underlying the Civil Rights Act of 1871, the Petitioners have challenged as devoid of legitimate historical and legal bases the United States Supreme Court rulings which bestow upon state judges absolute immunity from liability to civil suit under Section 1 of the Civil Rights Act of 1871, now codified in part

at 42 U.S.C 1983 and in part at 28 U.S.C. 1343(3). The first of such rulings this Court set forth twenty-seven years ago in *Pierson v. Ray*, 386 U.S. 547, 554 - 555, 87 S. Ct. 1213, 1217 (1967). Most recently the Court has reaffirmed *Pierson* in its progeny, *Mireles v. Waco*, ___ U.S. ___, 112 S. Ct. 286, 287 (1991).

The doctrinal challenge to *Pierson* and related cases encompasses broad issues in addition to the basic charge of commission of interpretive error by the Supreme Court.

Vis-a-vis proof of an affirmative will in the 42d Congress to subject state judges, and all other state officers, to civil liability under Section 1 of the Civil Rights Act of 1871, the rule of *Pierson* is repugnant to Amendment Fourteen of the constitution. The command of that Amendment is that "no State" shall either make or enforce laws infringing certain constitutional rights. The practical impact of *Pierson*, contrary to the will of the Framers of

Amendment Fourteen,[4] is to place an entire branch of state government beyond the reach of Amendment Fourteen strictures. Immunizing state judges from 42 U.S.C. liability, *Pierson* in functional effect permits, tacitly condones, unequal enforcement of the laws and failure of due process when such violations of organic law occur under state judicial aegis. Immunity doctrine emasculates this important civil rights Amendment by restricting use of the Civil Rights Act of 1871 as a legal basis for monetary recovery for violations of the Amendment's commands. In addition, the judgment of *Pierson* creates irrational distinctions among equal federal citizens by applying a facially neutral federal statute in a discriminatory manner, depriving some citizens of the use of the statute which was congressionally given to "any person" under United

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Opening debate to Amendment Fourteen, Representative Bingham, the author of Section 1 thereof, challenged both the nation and Congress with the following words: "The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violations of oaths enjoined upon them by their Constitution." *Cong. Globe*, 39th Cong., 1st Sess., 1089-1091 (1866).

States' jurisdiction for the purpose of enforcing and vindicating secured rights.

Coupled with the foregoing broad issues, Supreme Court immunization of state judges from liability under the 1871 Civil Rights Act constitutes an unwarranted obtrusion by the Court into the political arena and constitutes a breach of separation of powers. In applying *Pierson* and progeny to adjudicate civil rights claims, the Court has abandoned its proper constitutional and statutory functions of securing to each and every person, individually, the guarantys of "our national citizenship."[5] The Court presumes, instead, under notions insular to itself of policies of federalism and comity relative to 42 U.S.C. 1983, to protect the political values of "our federalism" — notwithstanding that under Section 5 of Amendment Fourteen the safeguard of federalism

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The phrase is Representative Shellabarger's. *James M. Comly Papers*, the Ohio Historical Society, Columbus, Ohio. MIC 33 B2/ R1. Shellabarger employs the phrase to designate the intent and purpose of the Civil Rights Act of 1871.

devolves upon Congress, not upon the Court.[6] Subse-

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See, e.g., Weschler, H., *The Political Safeguards of Federalism*. 54 COL. L. REV. 543, 559 - 560 (1954). Citing Madison's explication of the constitution as authoritative, Professor Weschler observes that under the American system of federalism central government intervention against the states is a matter for congressional determination. *Accord*, Hart, H., *State and Federal Law*. 54 COL. L. REV. 497 (1954) ("Federal Intervention against the states is discretionary and has belonged to Congress"). These law professors only reiterate the 42d Congress' assessment of its own power to enforce the provisions of the Fourteenth Amendment by the remedy of 42 U.S.C. 1983. *See, e.g.*, the speech of Senator Wilson (R. Mass.):

> It is for Congress to look to the question whether or not the State affords that protection the Constitution requires . . . Congress is not only the exclusive judge of the necessity for application of remedies, but is also the exclusive judge of what the remedies shall be. *Cong. Globe*, 42d Cong., 1st Sess., 482-483 (1871).

quent to the states' ratification of Sections 1 and 5 of Amendment Fourteen, the state possesses no valid interest[7] in shielding its constitutionally oppressive judges or court processes from the federal remedy of 42 U.S.C. 1983. Oblique political intervention by the Supreme Court to protect state judges by the creation of absolute exemption from statutory liability amounts to judicial legislation.

Confronted with the Petitioners' fresh legislative

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Had not the 42d Congress directly avowed that federalism's values were secure under the Act of 1871, then the Supreme Court might find justification for solicitous concern for the states. However, the opposite case is true. Representative Garfield (R. Ohio) declared from the floor that Congress had secured a bill "so guarded as to preserve intact the autonomy of the States." *Cong. Globe*, 42d Cong. 1st Sess., 808 (1871).

In an expansive personal vein and privately concurring with Garfield, Representative Shellabarger wrote reflectively to his friend and political ally, James Comly, publisher of the *Ohio State Journal:* "I like your views as to my position being short of the full idea of the 14th Amend. But that Amend., interpreted by the old rules of Construction, and pushed to their full logical consequences, would so invade what has been the exclusive domain of the States, that I do not, now at any rate, wish to go any further in that direction than the exigencies of the Country require. I want to establish, in our present action, no precedent denying the power more fully to protect our national citizenship in the future; & we have not. *James M. Comly Papers, ibid.*

evidence and its broad implications, the courts below, professing an obligation to exempt the Respondents-judges from suit pursuant to *Pierson* and *Mireles, supra*, overruled Petitioners' motion to apply to the legislative evidence **the statute-specific test** for abandonment of decisional precedent set forth in *Monroe v. Pape*, 365 U.S. 167, 192, 81 S. Ct. 473, 387 (1961) (Harlan, J., concurring), and approved in *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 715, 98 S. Ct. 2018, 2049 (1978) (Rhenquist, J., dissenting).

The inferior courts refused, likewise, to apply to the Petitioners' legislative evidence the general test for validation of an implied cause of action set forth in *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 2087 (1975). Notwithstanding that Petitioners alleged injury and had indubitably met their production burden pursuant to *Cort*, both courts declined to conduct an inquiry into the intention of the 42d Congress with respect to a private cause of action against state judges when it declared "any person" to be "liable to the party injured."

Provided as adjudicative guidelines for the federal courts, the tests of *Monroe* and *Cort* should have been applied. Indeed, to avoid delay in litigation the Sixth circuit in other cases *sua sponte* raises and decides questions of an implied statutory cause. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 358, 369, ___ S. Ct. ___ (1982). Notably, the Supreme Court's lengthy disquisition in *Merrill Lynch* as to the manner in which *Cort* factors are to be applied below is directed specifically to the Sixth circuit, the appeal in *Merrill Lynch* having originated from that court.

As an alternative to employing *Monroe* or *Cort*, *Pierson* should have been distinguished and its application to the Petitioner's case avoided. When faced, however, with what he described as "a frontal attack" on immunity doctrine, the federal magistrate assumed in his report and recommendations to the district court a rigid judicial posture, refusing to limit the value of *Pierson* as a binding precedent in the case.

Limitation of *Pierson* should properly have been

performed on numerous grounds, not least cogent of which was that the Petitioners' new evidence extended far beyond the minuscule amount of legislative matter upon which the *Pierson* judgment rests, rendering that holding insufficient to circumscribe the facts of the case *sub judice*.

More importantly, *Pierson* should have been limited on the ground that Petitioners' documentary evidence proved up congressional intent obviating thereby the belief-presumption-counterfactual system of reasoning upon which the specific ruling in *Pierson* is solely based. It is pellucid that the "judgment" of *Pierson* is a classic argument from scepticism interposed from the Bench. As such, it states no rule of law and establishes no legal precedent but amounts only to a demand (as do all counterfactuals) for further evidence. *Pierson* presents an hypothecation as to what the 42d Congress "would have"[8]

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See, Pierson v. Ray, 386 U.S. at 554-555, for the structure of the Court's ruling ("We do not believe that . . . no clear indication . . . we presume . . . Congress would have . . . had it wished").

done under conjectured but unsubstantiated conditions. *See, e.g.*, Hart and Honore, *Causation in the Law* 458 (1985) ("consideration of what would have happened upon a hypothetical set of facts"). Beyond dispute, the *Pierson* ruling is a supposable case waiting for evidence to happen to it. Under contrary documentation it is nonreiterable and cannot be reimposed when legislative evidence and reason combine to obviate the supposed case.

In lieu of dealing judicially with the inadequacies of *Pierson* in light of further congressional evidence, the magistrate, although acknowledging the counterfactual structure of *Pierson*, arbitrarily excluded the Petitioners' legislative evidence from the case in order to preserve the judgment of *Pierson* intact. The magistrate recommended as follows:

> Ms. Keplinger argues eloquently from the debates of the Reconstruction Congresses that they never intended to adopt or leave in place the common law immunities, of which judicial immunity is one. She further notes that much of the history she cites was apparently not considered by the Supreme Court either when it first recognized judicial immunity in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), or

> when it applied the doctrine in Section 1983 cases in *Pierson v. Ray, supra.*
>
> * * * *
>
> The difficulty with Plaintiff's argument for abandoning judicial immunity is that it is directed to the wrong court. [F]ederal district courts . . . have no authority to reverse United States Supreme Court precedent.
>
> * * * *
>
> Since this Court is obliged to follow Supreme Court precedent on judicial immunity, it should not entertain Ms. Keplinger's argument on the merits, but should follow the law as embodied in the relevant Supreme Court decisions as cited above.

Specifically adopting the posture of the district court magistrate, the Sixth circuit held: "[A]s explained by the magistrate judge, this Court may not supersede the law as handed down by the Supreme Court of the United States, which law bestows absolute immunity upon state judges." **The Sixth circuit, by reapplying *Pierson*, assumed the conclusion and improperly decided an important question of federal law which has not been, but should be, settled by this Court.** The court of appeals should have certified the issue for instruction pursuant to

Supreme Court Rule 19 and 28 U.S.C. 1254(3).

Neither the district court nor the Sixth circuit suggested the Petitioners' legislative argument to be frivolous, nor did either substantively attack the evidence or subject Petitioners to sanctions — events (or some combination of them) virtually certain to have occurred had Petitioners' congressional evidence been insufficient or fatally flawed. Rather, the courts below concur that this Court constitutes the **sole proper forum** for receipt of fresh legislative evidence challenging the doctrine of absolute judicial immunity as applied to Section 1983 suits. In a supplemental recommendation the magistrate reiterated: "The forum for arguing that the Supreme Court has made an historical error is the Supreme Court itself."

Possessing a heavily documented historical argument to present within the federal judicial system, Petitioners have been forced by the inferior courts at great monetary cost and expense of time ever upward through the federal judicial hierarchy now to petition this Court for a writ of certiorari. The Petitioners trail no sanctions to

defeat their profession of a good-faith argument. No scintilla of countervailing evidence weakens the argument which Petitioners bring here.

This Court is required under Supreme Court Rule 10 to exercise its supervisory power to ensure the integrity of the lower courts in the impartial administration of justice according to the rule of law. The Court cannot, however, determine whether the lower courts have improperly denied the Petitioners a valid cause of action under 42 U.S.C. 1983 and unlawfully deprived them of a statutory right to enforce the provisions of Amendment Fourteen until it has first determined whether, under Petitioners' fresh evidence of congressional intent, the doctrine of *Pierson* is a correct statement of statutory law pursuant to the will of the 42d Congress. The Court has authority to reconsider and abandon a precedent decision. *Monroe v. Pape*, 365 U.S. 167, at 192; *Helvering v. Griffiths*, 318 U.S. 371, 401, 63 S. Ct. 636 (1943). Accordingly, the Court should entertain the Petitioners' legislative argument and thereunder reexamine the grounds and the

statutory patency of *Pierson v. Ray.*

II. THE CASE IS RIPE FOR REVIEW

The constitutional and statutory issues presented by this case are amenable to prompt resolution by the Court. The conflict between the Petitioners and Respondents over the judicial immunity issue is specific, well-developed, and protracted. The doctrine of immunity exerts continuing discriminatory and harmful effect upon the Petitioners, and, absent grant of certiorari and ensuing abandonment of the doctrine under compulsion of legislative evidence, the injuries inflicted upon Petitioners by the Respondents and the judicial system will remain irremedial. The courts below concur that this case presents historical and legal questions determinable by this Court alone. The case is ripe for review.

CONCLUSION

The major and ancillary issues raised by this case are of vital concern both to the nation and to individual victims, the Petitioners included, of discrimination by state

judges perpetrated through unequal enforcement of state and federal law.

This case underscores the first premise of the Civil Rights Act of 1871, Section 1, and its jurisdictional subpremise. Judicial appeal through a discriminatory state-court system and direct review under the old constitution as it was before Amendment Fourteen is not sufficient[9] to protect the rights of our national citizenship, and it satisfies nothing toward recompense of injury thereto. A statutory cause against each who wrongfully deprives another of federal rights, placed under the original jurisdiction of a fact-finding district court possessed of machinery competent to develop evidence pertinent to

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Representative Storm (D.Pa.) distinguished the "reconstructed" jurisdictional plan for remedy of injury to federal rights subsequent to Amendment Fourteen and pursuant to 17 Stat. 13, Section 1:

> Now these questions could all be tried, I take it, in the state courts; and by writ of error, as provided by the twenty-fifth section of the act of 1789, could be brought before the Supreme Court for review. * * * But the first section of this bill does not allow that right. It takes the whole question away at once and forever. *Cong. Globe*, 42d Cong., 1st Sess., App. 86 (1871).

the whole case is necessary to particularize a federal civil remedy in each instance of state violation of secured rights.

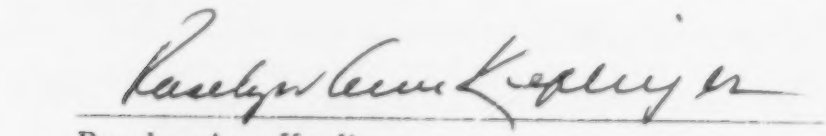
H.R. Report No. 16, forming an integral part of the legislative history of the Civil Rights Act of 1871, Section 1, delineates the gamut of state officials, including judges, intended to be made liable under the statute. **The Report** specifically defines the statutory language, "any person," as applied to state officers. It explains why Congress created a civil damages remedy against all state officials through Section 1 of the Act of 1871, placing jurisdiction over such cause in a fact-finding federal court.

Had the Supreme Court heeded Representative Shellabarger's admonition that the Civil Rights Act of 1871 proposed to reach persons and acts analogous to those congressionally investigated in **H.R. Report No. 16,** the Court could not arbitrarily have superimposed common-law immunities upon Section 1983 in construal of the Act's terms.

Like Charles Warren,[10] the Petitioners have ferreted out from antecedent legislative documents the congressionally intended meaning of long-disputed statutory terms. The Petitioners' historical argument, no less than Warren's, demands that the Supreme Court reexamine the bases of its prior decisional law and abandon rulings inconsonant with a demonstrable congressional intent underlying statutory enactment.

The Petitioners respectfully urge that writ of certiorari issue.

Respectfully submitted,



Roselyn Ann Keplinger
229 South Walnut Street
Urbana, Ohio 43078
Petitioners Pro Se

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Warren, C., *New Light on the History of the Federal Judiciary Act of 1789.* 37 HARV. L. Rev. 49 (1923).

APPENDIX

No. 93-3588

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROSELYN ANN KEPLINGER,

Plaintiff-Appellant,

v.

RICHARD K. WILSON;
WILLIAM H. WOLFF, JR.;
MIKE FAIN;

Defendants-Appellees,

STATE OF OHIO,

Defendant.

BEFORE: NELSON and BATCHELDER, Circuit Judges, and CONTIE, Senior Circuit Judge.

Roselyn Ann Keplinger, pro se, appeals a district court order dismissing this civil rights complaint for lack of subject matter jurisdiction and for failure to state a claim. Filed under 42 U.S.C. § 1983, the complaint named as defendants three Ohio state court appellate judges and the State of Ohio. The case has been referred to a panel of the

court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In her complaint, Keplinger alleged that the defendants denied her procedural due process and equal protection of the law by utilizing a "local practice or pattern of action" to "advance the litigatory interests of a class of medical defendants represented by specific, sizable and prestigious law firms within the Second Ohio Appellate District." Her allegation was that this "local practice" resulted in a grant of summary judgment under Ohio state law in favor of certain doctors that she had sued in state court for medical malpractice. Keplinger's principal argument is that the three judges named as defendants, who comprised the state court panel that decided her malpractice case, improperly applied the standard for summary judgment proceedings, based on evidence that she alleges supports her underlying claims of malpractice and of conspiracy among the doctors and the judges in the state courts.

The matter was referred to a magistrate judge, who

determined that: (1) the court had no jurisdiction to grant the requested relief under the doctrine set forth in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (the *Rooker-Feldman* doctrine); (2) the Eleventh Amendment barred monetary relief against the State of Ohio and the defendants in their official capacities; and (3) sued in their individual capacities, the three judges were absolutely immune under the doctrine of judicial immunity. In a supplemental report, the magistrate judge again recommended that the claim should be dismissed without prejudice for lack of subject matter jurisdiction, based on the rationale set forth in his original report. After considering the two reports, as well as Keplinger's objections to them, the district court adoped the reports in their entirety, dismissing the complaint by order and judgment entered March 19, 1993. Keplinger then filed a motion for reconsideration of that order, which motion was denied by order entered April 21, 1993.

On appeal, Keplinger advances the following argu-

ments: (1) the Forty-Second Congress, in enacting the Ku Klux Klan Act, intended to abolish the doctrine of absolute judicial immunity in suits brought under that statute; (2) the district court abused its discretion by disregarding certain evidence that she had presented, i.e., "fresh legislative evidence showing an affirmative intent in the forty-Second Congress to subject state judges to liability under Section One of the Civil Rights Act of 1871"; and (3) the district court abused its discretion by deciding that it lacked jurisdiction, when the state court judgment was based upon an alleged violation of the Constitution and was procured by fraud.

This court reviews de novo a district court's decision to dismiss a case for failure to state a claim. Fed. R. Civ. P. 12(b)(6); *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475 (6th Cir.), *cert. denied*, 498 U.S. 867 (1990). The court must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of her claims

that would entitle her to relief. *Meador*, 902 F.2d at 475.

In support of her case, Keplinger continues to argue that the doctrine of judicial immunity should be abandoned. However, as explained by the magistrate judge, this court may not supersede the law as handed down by the Supreme Court of the United States, which law still bestows absolute immunity upon state court judges performing acts essential to their adjudicative functions, as the judges were, in this case. *Mireles v. Waco*, 112 S. Ct. 286, 288 (1991) (per curiam); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967); *Sparks v. Character and Fitness Comm.*, 859 F.2d 428, 430-31 (6th Cir. 1988), *cert. denied*, 489 U&.S. 1011 (1989). The acts upon which Keplinger bases her complaint were performed clearly within the subject matter of the state court of appeals. Therefore, the judges were acting within their official duties in determining that the defendants in the state court action were entitled to summary judgment under state law. *King v. Love*, 766 F.2d 962, 965-66 (6th Cir.), *cert. denied*, 474 U.S. 971 (1985).

Moreover, the district court lacked authority to review the state court's final judgment, because the court would have been required to review the same claims asserted between the parties in the state court litigation, notwithstanding Keplinger's assertion of those claims within a federal constitutional context. *Feldman*, 460 U.S. at 485-86; *Sun Valley Foods Co. v. Detroit Marine Terminals, Inc. (In re Sun Valley Foods Co.)*, 801 F.2d 186, 189 (6th Cir. 1986). The district court could not review the claim even if it had considered that state court judgment to be incorrect. *Sun Valley Foods Co.*, 801 F.2d at 189. Lastly, this claim does not fall within the exception set forth in *Sun Valley Foods*, because the state court judgment was not procured by fraud. *Id.*

Accordingly, the district court's order dismissing this case for failure to state a claim and for lack of subject matter jurisdiction is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Clerk

No. 93-3588

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROSELYN ANN KEPLINGER,

Plaintiff-Appellant,

v.

RICHARD K. WILSON, ET AL.,

Defendant-Appellees,

STATE OF OHIO,

Defendant.

BEFORE: NELSON and BATCHELDER, Circuit Judges; and CONTIE, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the peti-

tion were fully considered upon the original submision and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Case No. C-3-92-192

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROSELYN ANN KEPLINGER,

Plaintiff,

vs.

RICHARD K. WILSON, et. al.,

Defendants.

Judge Walter Herbert Rice

DECISION AND ENTRY OVERRULING PLAINTIFF'S OBJECTIONS (DOCS. #36, #39, #43 AND #47) TO THE REPORTS AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE (DOCS. #33, #37, #41 AND #46) AND ADOPTING THOSE REPORTS AND RECOMMENDATIONS IN THEIR ENTIRETY; ENTRY SUSTAINING DEFENDANTS' MOTIONS TO DISMISS (DOCS. #10, #12 AND #21; ENTRY OVERRULING OHIO'S MOTIONS FOR SANCTIONS (DOCS. #12 AND #21); ENTRY OVERRULING PLAINTIFF'S MOTIONS TO RETAIN DEFENDANTS AS TECHNICAL DEFENDANTS (DOCS. #15 AND #23); ENTRY OVERRULING PLAINTIFF'S MOTION TO ABROGATE JUDICIAL IMMUNITY (DOC. #20); ENTRY OVERRULING PLAINTIFF'S MOTION FOR EVIDENTIARY HEARING (DOC. #40); ENTRY OVERRULING PLAINTIFF'S MOTION TO TAKE JUDICIAL NOTICE (DOC. #44); JUDGMENT TO BE ENTERED IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFF: TERMINATION ENTRY

This case arises out of the death of the Plaintiff's mother.[1] In 1986, the Plaintiff initiated a wrongful death action, predicated upon alleged medical malpractice, in the Court of Common Pleas for Champaign County, Ohio. Subsequently, that court granted summary judgment to the defendants therein and dismissed the wrongful death action. Plaintiff appealed that decision to the Ohio Court of Appeals for the Second Appellate District ("Court of Appeals"), which affirmed the trial court and declined to certify the case to the Ohio Supreme Court. Dissatisfied with the results which she obtained in state court, Plaintiff initiated this action, asserting claims under 42 U.S.C. § § 1983 and 1985 and seeking compensatory and punitive damages and a declaration that the state courts' judgments are void. The Plaintiff named the three members of the Court of Appeals and the State of Ohio ("Ohio") as defendants herein. The members of the Court

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The Plaintiff brings this action in two capacities, individually and as executrix of her mother's estate. Accordingly, the Court will refer to the Plaintiff in the singular.

of Appeals filed a motion to dismiss (Doc. #10), arguing that they were absolutely immune from suit pursuant to the doctrine of judicial immunity. Ohio also filed a motion to dismiss (Doc. #12), arguing that the Eleventh Amendment prevents this Court from hearing Plaintiff's claims against it.[2] In addition to filing memoranda in opposition to the motions, Plaintiff filed a motion to retain the members of the Court of Appeals as technical defendants (Doc. #15), a motion requesting that the Court abrogate the doctrine of judicial immunity (Doc. #20) and a motion to retain Ohio as a technical defendant (Doc. #23).

This Court referred this litigation to the United States Magistrate Judge for a Report and Recommendations on the pending motions. *See* Doc. #27. On October 13, 1992, the Magistrate Judge issued his Report and Recommendations, in which he recommended that the Court

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Ohio filed its motion to dismiss a second time. *See* Doc. #21. Ohio's two motions do not differ.

grant the Defendants' motions to dismiss (Docs. #10, #12 and #21)[3] and dismiss Plaintiff's claims for monetary relief with prejudice and dismiss without prejudice her request that the Court declare the state court judgments void, for want of subject matter jurisdiction. The Magistrate Judge also recommended that the Court overrule Plaintiff's motions to retain the members of the Court of Appeals as technical defendants (Doc. #15), to abrogate the doctrine of judicial immunity (Doc. #20) and to retain Ohio as a technical defendant (Doc. #23).[4] The Plaintiff objected to the Magistrate

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In its motions to dismiss (Docs. #12 and #21), Ohio also requested, pursuant to Rule 11, that the Court impose sanctions upon the Plaintiff. In his Report and Recommendations (Doc. #33), the Magistrate Judge recommended that the Court deny Ohio's request for sanctions. Ohio did not object to the Magistrate Judge's recommendation in that regard, and the Court adopts same. Accordingly, the Court overrules Ohio's motions (Docs. #12 and #21), to the extent that they seek an award of sanctions.

Judge's Report and Recommendations, and the matter was recommitted to that judicial officer. *See* Doc. #36. The Magistrate Judge then issued his Supplemental Report and Recommendations (Doc. #37), adhering to his previous recommendations, to which the Plaintiff also objected. *See* Doc. #39.

Subsequently, Plaintiff filed a motion for an evidentiary hearing on the motions to dismiss (Doc. #40). The Magistrate Judge issued a Report and Recommendation (Doc. #41), recommending that the Court overrule that motion. Plaintiff filed objections (Doc. #43) to that Report and Recommendation and filed a motion (Doc. #44) requesting that the Court to take judicial notice of the facts which would have been established at the hearing. The Magistrate Judge recommended that this

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The Magistrate Judge also recommended that the Court overrule Plaintiff's motion to strike (Doc. #310. Plaintiff sought to have the Court strike a certified copy of the Court of Appeals decision in the state court litigation. *See* Doc. #25. The Plaintiff did not object to this portion of the Magistrate Judge's Report and Recommendations (Doc. #33). Consequently, the Court adopts that portion of the Report and Recommendations and overrules Plaintiff's motion to strike.

motion be overruled, to which the Plaintiff objected. *See* Docs. #46 and #47.

This case comes before the Court on Plaintiff's objections (Docs. #36, #39, #43 and #47) to the Reports and Recommendations of the Magistrate Judge (Docs. #33, #37, #41 and #46). Under 28 U.S.C. § 636(b)(1)(B), a district court may refer a dispositive motion, such as a motion to dismiss or for summary judgment, to a Magistrate Judge.[5] When a district court refers such a motion to a Magistrate Judge, he or she will issue a report and recommendations. Within ten days of being served with the report and recommendations, any party may file objections to same. 28 U.S.C. § 636(b)(1). When objections are filed, the district court must "make *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.* Thus, when a Magistrate Judge issues a report and recommendations on a dispositive motion (such as a

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5 The Court assumes that all pending motions are dispositive motions.

motion for summary judgment or a motion to dismiss), the district court conducts a *de novo* review. *See e.g., U.S. Fidelity and Guaranty Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1088 (6th Cir. 1992); *Roland v. Johnson*, 856 F.2d 764, 768-89 (6th Cir. 1988).

This Court has conducted a *de novo* review of the Magistrate Judge's Reports and Recommendations, as well as Plaintiff's objections thereto and the parties' memoranda relating to the various motions. Based upon its review, the Court concludes that the Magistrate Judge was correct in all of his Reports and Recommendations. Additionally, the Court makes the following comments. *First*, the doctrine of absolute judicial immunity, a doctrine which this Court does not have the power to abrogate,[6] prevents the Plaintiff from maintaining an action against the members of the Court of Appeals. *See e.g., Stump v. Sparkman*, 435 U.S. 349

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6 Only the United States Supreme Court can abrogate the doctrine of sovereign immunity.

(1978). *Second*, the Eleventh Amendment prevents the Plaintiff from maintaining this action against Ohio. *Edelman v. Jordan*, 415 U.S. 651 (1974). *Third*, this Court does not have the subject matter jurisdiction to declare the state court judgments void, even if they were based upon violations of the United Statees Constitution; rather, review of a state court's judgment in this regard can be had only in the United States Supreme Court. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1988).

Based upon the foregoing, this Court overrules Plaintiff's objections (Docs. #36, #39, #43 and #47) to the Reports and Recommendations of the Magistrate Judge (Docs. #33, #37, #41 and #46) and adopts those Reports and Recommendations in their entirety. Accordingly, the Court rules on the pending motions in the following manner.

1. The motion of the members of the Court of Appeals to dismiss (Doc. #10) is sustained.

2. The motions of Ohio to dismiss (Docs. #12 and #21) are sustained.

3. The motions of Ohio for sanctions (Docs. #12 and #21) are overruled.

4. The Plaintiff's motion to retain the members of the Court of Appeals as technical defendants (Doc. #15) is overruled.

5. The Plaintiff's motion to abrogate the doctrine of judicial immunity (Doc. #20) is overruled.

6. The Plaintiff's motion to retain to Ohio as a technical defendant (Doc. #23) is overruled.

7. The Plaintiff's motion to strike (Doc. #31) is overruled.

8. The Plaintiff's motion for an evidentiary hearing (Doc. #40) is overruled.

9. The Plaintiff's motion to take judicial notice (Doc. #44) is overruled.

The Court hereby directs that judgment be entered in favor of Defendants and against Plaintiff, dismissing Plaintiff's claims for monetary damages with prejudice and dismissing Plaintiff's request that the Court declare the state court judgments void without prejudice for want of subject matter jurisdiction.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court

for the Southern District of Ohio, Western Division, at Dayton.

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

C-3-92-192

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROSELYN ANN KEPLINGER, et. al.,

Plaintiffs,

vs.

RICHARD K. WILSON,

Defendant.

Judge Walter Herbert Rice

DECISION AND ENTRY OVERRULING PLAINTIFF'S MOTION FOR RECONSIDERATION (DOC. #50) OF DECISION AND ENTRY OF MARCH 19, 1993 (DOC. #48)

The Plaintiff's Motion for Reconsideration (Doc. #50) of this Court's Decision and Entry of March 19, 1993 (Doc. #48), and the Judgment Entry issued thereon (Doc. #49), construed as a timely motion for new trial pursuant to Fed. R. Civ. P. 59, is, after due consideration,

overruled in its entirety.[1]

April 21, 1993

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

1

In her Motion for Reconsideration, Plaintiff argues that certain legislative history demonstrates that Congress did not intend that the doctrine of absolute judicial immunity should apply in actions brought under 42 U.S.C.§ 1983. *See e.g., Pierson v. Ray*, 386 US. 547 (1967) (per Warren, C.J.). Thus, even if this Court agreed with Plaintiff's view of the relevant legislative history, the decision to abolish absolute judicial immunity on the basis of that legislative history, would rest with the Supreme Court of the United States and not with this Court.

AMENDMENT XIV [1868]

Section 1 All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

17 Stat., Ch. 22, 13 (1871)

Chap. XXII. An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of

the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and *to* furnish the means of their vindication;" and the other remedial laws of the United States which are in their nature applicable in such cases.[1*]

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1 *Cong. Globe*, 42d Cong., 1st Sess., App. 335 (1871).

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* The United States Supreme Court has approved advertence to the original text of a statute when its terms and provisions are in issue. *United States v. Hirsch*, 100 U.S. 33 (1879) ("It must be admitted that, in construing any part of the Revised Statute, it is admissible, and often necessary, to recur to its connection in the Act of which it was originally a part").

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. Rev. Stat. § 1979 (1988).